(10)

NO. 89-7662

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1990

ROGER KEITH COLEMAN, Petitioner

- versus -

CHARLES E. THOMPSON, WARDEN
MECKLENBURG CORRECTIONAL CENTER
OF THE COMMONWEALTH OF VIRGINIA Respondent

On Writ Of Certiorari To The
United States Court of Appeals
For The Fourth Circuit

BRIEF OF AMICI CURIAE FOR RESPONDENT THOMPSON BY KENTUCKY AND ALABAMA, ARKANSAS, COLORADO, DELAWARE, FLORIDA, HAWAII, IDAHO, ILLINOIS, INDIANA, MARYLAND, MINNESOTA, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW JERSEY, NORTH CAROLINA, PENNSYLVANIA, SOUTH CAROLINA, UTAH, WASHINGTON, WEST VIRGINIA

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*QUESTIONS PRESENTED FOR REVIEW

1. Under Harris v. Reed, (1989) 489 U.S. 255, is it permissible for the federal court to analyze, on federal habeas review, state law and state court record to determine whether federal claims are barred by state procedural default?

2. Should federal court waive procedural default resulting from post-conviction counsel's failure to file timely appeal when default would bar any hearing on petitioner's constitutional claims?

3. Does the deliberate bypass standard of Fay v. Noia, 372 U.S. 391 (1963), continue to apply to procedural default resulting from complete failure to take appeal?

*This brief will only address questions 2 and 3.

COUNTERSTATEMENT OF QUESTIONS 2 and 3 PRESENTED FOR REVIEW

DOES ATTORNEY ERROR IN STATE PROCEEDINGS WHERE THE SIXTH AMENDMENT'S RIGHT TO COUNSEL DOES NOT APPLY CONSTITUTE "CAUSE" TO EXCUSE A PROCEDURAL DEFAULT?

TABLE OF CONTENTS

TABLE OF CONTENTS

VIRGINIA COURT RULE

FEDERAL STATUTES

INTERESTS OF AMICI CURIAE IN SUPPORT OF RESPONDENT THOMPSON

The Amici Curiae represented here are States interested in the application of the rule of procedural default regarding state court post-conviction proceedings as a bar upon claims made by petitioners in federal habeas corpus proceedings.

Amici submit this brief in support of Respondent, Charles E. Thompson, Warden, Mecklenburg Correctional Center, Commonwealth of Virginia, through their Attorneys General or Chief State Attorneys pursuant to United States Supreme Court Rule 37.3.

SUMMARY OF ARGUMENT

In Wainwright v. Sykes, 433 U.S. 72 at 88-90 (1977), this Court recognized a basic principle of finality for criminal convictions and imposed a requirement of "cause and prejudice" to excuse a procedural default in state court regarding constitutional errors asserted in a federal court habeas petition. The Sykes requirement is applicable to state

post-conviction proceedings and appeals. The Sixth Amendment's right of effective assistance of counsel is not applicable to post-conviction proceedings and appeals. A violation of the Sixth Amendment's right to effective assistance is "cause" for procedural default, but when the Sixth Amendment does not apply, no right to counsel exists and counsel's errors may constitutionally be imputed to the habeas petitioner since no constitutional right has been violated. If a habeas petitioner may assert an error of counsel in a state post-conviction proceeding or appeal as "cause" for procedural default, the Sykes principle of finality will be destroyed since a habeas petitioner may undertake endless successive litigation merely by alleging ineffective assistance of counsel in the previous post-conviction proceeding or appeal. The state courts would, as a practical matter, be forced to permit successive post-conviction petitions, and the federal courts would be required to permit

successive habeas petitions, in order to resolve successive claims of ineffective assistance of counsel regarding the previous post-conviction proceeding or appeal. Sykes and subsequent opinions of this Court applying Sykes have effectively adopted Justice Harlan's dissenting opinion in Fay v. Noia, 372 U.S. 391 at 448-476 (1963). The Sykes principle of finality requires that the "deliberate bypass" standard of Fay v. Noia, 372 U.S. at 438-439 be overruled and that "cause" for a procedural default in a post-conviction proceeding or appeal be limited to external impediment or actual innocence.

ARGUMENT

IN PROCEEDINGS WHERE THE SIXTH AMENDMENT RIGHT TO COUNSEL DOES NOT APPLY (STATE POST-CONVICTION PROCEEDINGS), ATTORNEY ERROR MAY NOT CONSTITUTE "CAUSE" FOR STATE PROCEDURAL DEFAULT.

Coleman was convicted of rape and capital murder in the Virginia State courts. The Supreme Court of Virginia affirmed his

conviction on direct appeal. Coleman v. Commonwealth, 226 Va. 31, 307 S.E.2d 864 (1983), cert. denied 465 U.S. 1109 (1984). Next Coleman filed a petition for post-conviction relief (application for a writ of habeas corpus under Virginia law) in the appropriate state court. The Buchanan County Circuit Court held an evidentiary hearing and denied the writ. Coleman's post-conviction counsel filed a petition for leave to appeal to the Virginia Supreme Court, but because his notice of appeal had been filed more than thirty (30) days after entry of final judgment in violation of Virginia Supreme Court Rule 5:9(a), the Virginia Supreme Court dismissed the appeal. Coleman v. Thompson, 895 F.2d 139 at 141-142 (4th Cir. 1990). The Federal District Court and the Fourth Circuit concluded that the failure of Coleman's post-conviction counsel to timely and properly perfect his application for appeal to the Virginia Supreme Court constituted a procedural default barring review of his

claims under the federal habeas corpus statute. 895 F.2d at 144. In concluding that Coleman failed to demonstrate "cause" for his procedural default, the Fourth Circuit stated in part, 895 F.2d at 144:

> The difference in the proceedings [between a direct appeal from a judgment of conviction and a discretionary appeal from a denial of post-conviction relief] is significant, for a state prisoner seeking a writ of habeas corpus does not have a constitutional right to counsel. Murray v. Giarratano, __ U.S. __, 109 S.Ct. 2765, 106 L.Ed.2d 1 (1989). Wainwright v. Torna [455 U.S. 586 (1982)] rejects a claim that is essentially similar to Coleman's. In Torna, a prisoner's counsel filed an application for discretionary review in the State Supreme Court one day late. The prisoner charged that this error denied him effective assistance of counsel. The Supreme Court held: "Since [the prisoner] had no constitutional right to counsel, he cannot be deprived of the effective assistance of counsel by his retained counsel's failure to file the application timely." 455 U.S. at 587-88. Because Coleman, like Torna, had no constitutional right to counsel, he cannot be deprived of the effective assistance of counsel. Thus, he cannot show "cause" by showing ineffective assistance of counsel.

In Wainwright v. Sykes, 433 U.S. 72 at 88-90 (1977), this Court recognized a basic

principle of finality for criminal convictions and imposed a requirement of "cause and prejudice" to excuse a procedural default in state court regarding constitutional errors asserted in a federal habeas petition. Sykes limited the "deliberate bypass" standard of Fay v. Noia, 372 U.S. 391 at 438-439 (1963). The Sykes rule and finality principle were reiterated by this Court in Engle v. Issac, 456 U.S. 107 at 126-129 (1982). See especially Id., 456 U.S. at 126-128 and n.31 [citing, inter alia, Sanders v. United States, 373 U.S. 1 at 24-25 (1963) (Harlan, J., dissenting)]. The Sykes standard and finality principle were subsequently applied to state appellate court proceedings. Murray v. Carrier, 477 U.S. 478 at 494-495 (1986); Smith v. Murray, 477 U.S. 527 at 533 (1986).

In Pennsylvania v. Finley, 481 U.S. 551 (1987), the Court held that the states are not required by the federal constitution to provide assistance of counsel in collateral (post-conviction) proceedings and that if a

state elects to do so such counsel need not comply with all the requirements imposed pursuant to the Sixth Amendment. The court stated in part, 481 U.S. at 555:

> We have never held that prisoners have a constitutional right to counsel when mounting collateral attacks upon their convictions, and we decline to do so today. Our cases establish that the right to appointed counsel extends to the first appeal of right, and no further. Thus, we have rejected suggestions that we establish a right to counsel on discretionary appeals. We think that since a defendant has no constitutional right to counsel when pursuing a discretionary appeal on direct review of his conviction, a fortiori, he has no such right when attacking a conviction that has long since become final upon exhaustion of appellate process. [Citations omitted.]

The court further stated in Finley, 481 U.S. at 558 and 559:

> [T]he substantive holding of Evitts [v. Lucey, 469 U.S. 387 (1985)] -- that the State may not cut off a right to appeal because of a lawyer's ineffectiveness -- depends on a constitutional right to appointed a counsel that does not exist in state habeas proceedings. . . . At bottom, the decision below rests on premise that we are unwilling to accept -- that when a State chooses to offer help to those seeking relief from

convictions, the Federal Constitution dictates the exact form that such assistance must assume. . . . In this context, the Constitution does not put the State to the difficult choice between affording no counsel whatsoever or following the strict procedural guidelines annunciated [pursuant to the Sixth Amendment.]

In Evitts v. Lucey, 469 U.S. 387, 396, n.7, the court noted in part:

> Of course, the right to effective assistance of counsel is dependent on the right to counsel itself. See Wainright v. Torna [supra.] ("Since respondent had no constitutional right to counsel, he cannot be deprived of effective assistance of counsel by his retained counsel's failure to file the application timely") (footnote omitted).

In United States v. Frady, 456 U.S. 152 at 164-165 (1982), the ninth collateral attack upon a D.C. conviction pursuant to Title 28 U.S.C. Section 2255, the Court found that the D.C. Circuit had erroneously applied the "plain error" standard for direct appeals to a collateral attack and stated:

> Once the defendant's chance to appeal has been waived or exhausted, however, we are entitled to presume he stands fairly and finally convicted, especially when as here, he already has had a fair opportunity to present his claims to a federal forum. Our trial

> and appellate procedures are not so unreliable that we may not afford their completed operation any binding effect beyond the next in a series of endless post conviction collateral attacks. To the contrary, a final judgment commands respect. For this reason, we have long and consistently held that a collateral challenge may not do service for an appeal. [Emphasis added.]

In Barefoot v. Estelle, 463 U.S. 880 at 887 (1983), the Court stated in pertinent part:

> [I]t must be remembered that direct appeal is a primary avenue for review of a conviction of a sentence, and death penalty cases are no exception. When the process of direct review -- which, if a federal question is involved includes the right to petition this Court for a writ of certiorari -- comes to an end, a presumption of finality and legality attaches to the conviction and sentence. The role of federal habeas corpus proceedings, while important in assuring the constitutional rights are observed, is secondary and limited. Federal Courts are not forums in which to relitigate state trials.

Also see Strickland v. Washington, 466 U.S. 668 at 697 (1984), "[T]he presumption that a criminal judgment is final is at its strongest in collateral attacks on that judgment."

In Thomas v. Arn, 474 U.S. 140 (1985), this Court affirmed the judgment of the Sixth Circuit which had held that Thomas had forfeited her right to appeal from the judgment of the district court denying the habeas corpus writ by failing to file objections to the federal magistrate's report as required by a rule of the Sixth Circuit. It should be noted that in that case Thomas was represented by counsel and the error in failing to object to the Magistrate's Report was that of counsel representing Thomas in the habeas corpus proceeding. The final argument made by Thomas was that the decision of the Sixth Circuit denied her statutory right of appeal in violation of the Due Process Clause. On this point, the court stated in part:

> We recently reiterated our long-standing maxim that "the State certainly accords due process when it terminates a claim for failure to comply with a reasonable procedural or evidentiary rule." The same rationale applies to the forfeiture of an appeal, and we believe that the Sixth Circuit's rule is reasonable. Litigants subject

> to the Sixth Circuit's rule are afforded "ar. opportunity . . . . granted at a meaningful time and in a meaningful manner," to obtain a hearing by the Court of Appeals. [Citations and secondary quotation marks omitted.]

If an attorney error, as in the Thomas case, could forfeit a federal habeas corpus petitioner's right of appellate review, then clearly a failure by counsel in a state post-conviction proceeding to comply with state law may operate as a procedural default for purposes of federal habeas corpus review. If the error of counsel, as in the Thomas case, may be imputed to the federal habeas corpus petitioner on appeal in federal court, then the error of counsel in a state post-conviction proceeding appeal may also be imputed to the federal habeas corpus petitioner. As this Court's opinion in Barefoot v. Estelle, and United States v. Frady, supra, suggest post-conviction proceedings, be they state or federal, are secondary to the primary means of review, direct appeal from conviction (to the extent authorized by law).

In Murray v. Carrier, 477 U.S. 478 (1986), the Court held that defense counsel's inadvertence in failing to raise a due process claim on direct appeal from conviction in state court did not establish cause for procedural default in order to permit a federal court to review the claim under the habeas corpus statute. In that case, the court stated in part, 477 U.S. at 488:

> So long as a defendant is represented by counsel whose performance is not constitutionally ineffective under the standard established in Strickland v. Washington, [466 U.S. 668 (1984)], we discern no inequity in requiring him to bear the risk of attorney error that results in a procedural default. Instead, we think that the existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's effort's to comply with the State's procedural rule. . . . Similarly, if a procedural default is a result of ineffective assistance of counsel, the Sixth Amendment itself requires that responsibility for default be imputed to the State[.] [Emphasis added.]

In Strickland v. Washington, 466 U.S. 668 at 687 (1984), the court established the standard for ineffective assistance of counsel and described it in pertinent part:

> [T]he defendant [habeas petitioner] must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. [Emphasis added.]

The Court further stated in Murray v. Carrier, 477 U.S. at 491 and 492:

> We likewise believe that the standard for cause should not vary depending on the timing of a procedural default on the strength of an uncertain and difficult assessment of the relative magnitude of the benefits attributable to the state procedural rules that attach at each successive stage of the judicial process. . . . It is apparent that frustration of the State's interests that occurs when an appellate procedural rule was broken is not significantly diminished when counsel's breach results from ignorance or inadvertence rather than a deliberate decision, tactical or not, to abstain from failing to raise the claim.
>
> * * * *
>
> The real thrust of respondent's arguments appears to be on appeal that it is inappropriate to hold the defendants to the errors of their attorneys. Were we to accept that proposition, defaults on appeal would presumably be governed by rule equivalent to Fay v. Noia's "deliberate by-pass" standard [372 U.S. 391 at 438-439 (1963)], under which only personal waiver by the defendant will require enforcement of a procedural default. We express no opinion as to whether counsel's decision not to take an appeal at all might require treatment under such a standard[.]

Petitioner's assertion to the effect that convicts must be guaranteed effective assistance of post-conviction counsel in order to pursue a claim of ineffective assistance of trial counsel should be rejected because such a guarantee would ultimately permit unlimited litigation of ineffective assistance of counsel claims merely by alleging counsel in a previous post-conviction proceeding or appeal therefrom (including federal habeas proceedings) was ineffective. It cannot be doubted that such claims are increasingly being asserted by convicts attacking their convictions. See for example: Vunetich v. Commonwealth, 1990 Kentucky Lexis 96 (September 27, 1990) (petitions for rehearing and modification pending), [Vunetich in his second post-conviction proceeding claimed "that his last appellate counsel was ineffective in raising the question of the ineffectiveness of his previous appellate counsel who he claims was ineffective in

raising the issue of ineffectiveness of his trial counsel."]; Lingar v. State, 766 S.W.2d 640 (Mo., 1989), cert. denied 110 S.Ct. 258, [in a second post-conviction proceeding Lingar claimed ineffectiveness of counsel in previous post-conviction proceeding]; Resnover v. State, 547 N.E.2d 814 at 816 (Ind. 1989) (death penalty case), citing Schiro v. State, 533 N.E.2d 1201 at 1204-1205 (Ind. 1989) (death penalty case), cert. denied 110 S.Ct. 268; Lane v. State, 521 N.E.2d 947 at 948 (Ind. 1988) cert. denied 110 S.Ct. 268, and Alston v. State, 521 N.E.2d 1331 at 1335 (Ind.App. 1988); People v. Churchill, 136 Ill.App.3d 123, 482 N.E.2d 355 (1985), cert. denied 476 U.S. 1118; Commonwealth v. Lawson, 549 A.2d 107 (Pa. 1988); Datta v. Maass, 91 Or.App., 222, 754 P.2d 36 (1988), review denied, 306 Or. 413, 761 P.2d 531, [in a second post-conviction proceeding petitioner claimed he had ineffective assistance of counsel in previous post-conviction

proceeding]; Blair v. Armontrout, 916 F.2d 1310 at 1331-1332 (8th Cir. 1990), [Blair argued pro se his constitutional right to effective assistance of counsel was infringed when his court appointed counsel failed to raise all exhausted issues in the federal district court habeas proceeding and on appeal therefrom]; Andre v. Guste, 850 F .2d 259 at 263 (5th Cir. 1988), [habeas petitioner filed successive petition; "[i]f we were to hold that, despite Andre's failure to timely appeal the dismissal of his first petition, Andre could obtain an out-of-time appeal by the simple expedient of refiling his first petition, that would be tantamount to doing away with the clear requirements of [Fed.R.App.P] Rule 4 for an entire class of litigation."].

As the Illinois Court of Appeals noted in People v. Churchill, 482 N.E.2d at 357:

> The only differences between the three [post-conviction] petitions appear to be that each petition merely adds new attorneys to the list of those alleged to be incompetent. This strategy of

> continually filing new petitions for post-conviction relief based on incompetency of counsel could go on ad infinitum.

As the Indiana Court of Appeals declared in Alston v. State, 521 N.E.2d at 1335:

> We decline to take a step backward and create a new vehicle by which a defendant could use a PCR [post-conviction relief petition] to attack a previous PCR on the grounds of incompetency of counsel in that PCR hearing, and then use yet a third PCR to attack the competency of counsel of the second PCR and so on in perpetuity.

In Commonwealth v. Lawson, 549 A.2d at 112, the Pennsylvania Supreme Court concluded:

> [W]e cannot permit our continuing concern for assuring that persons charged with crime receive competent representation in their defense to be exploited as a ploy to destroy the finality of judgments fairly reached . . . . We hold today that the mere assertion of ineffective assistance of counsel is not sufficient to override the waiver and "finally litigated" provisions in the P.C.H.A. [Post-Conviction Hearing Act], as to permit the filing of repetitive or serial petitions under the banner of that statute. [Footnote omitted.]

In United States ex rel. Spurlark v. Wolff, 699 F.2d 354 (7th Cir. 1983) (en banc), the Seventh Circuit held the claim presented

by the habeas petitioner was defaulted for failure to raise it on appeal in the Illinois courts (anticipating correctly the decision in Carrier). After reviewing the opinions of this Court and cases from the Second, Third, Fourth, and former Fifth Circuits, the Seventh Circuit concluded:

> After analyzing the factors discussed [previously] . . . and the language of the recent Supreme Court decisions we agree that the rumors of Fay [v. Noia, 372 U.S. 391 (1963)]'s death are not greatly exaggerated.

In Presnell v. Kemp, 835 F.2d 1567 at 1580 (11th Cir. 1988), cert. denied 488 U.S. 1050, the Eleventh Circuit upheld a state law prohibiting successive post-conviction petitions. After reviewing the precedents of this Court and the Fourth, Sixth, Seventh, Ninth, and Eleventh Circuits, that Court concluded that the failure to raise a claim in the first state post-conviction petition was a procedural default requiring that the habeas petitioner show cause and prejudice. The Eleventh Circuit explained its reasoning in part (835 F.2d at 1579):

The cause and prejudice test is more compatible with the scheme of section 2254 than is the deliberate bypass test. In fact, giving a state prisoner an evidentiary hearing in federal court on a claim the state collateral attack court has refused to hear because it was in a successive petition, unless the state proves that the prisoner deliberately bypassed his state remedy, would frustrate that scheme. First, as we have pointed out, the state could rarely demonstrate a deliberate bypass; consequently, the federal courts almost always would be forced to hold evidentiary hearings on defaulted claims. Moreover, because the deliberate bypass test would seldom operate to bar a claim, collateral attack counsel might be more likely to overlook a claim in preparing his client's first state petition, thus increasing the number of claims to be resolved in the first instance by the federal courts.

Second, the application of the deliberate bypass test could lead to forum shopping. Because the deliberate bypass test focuses on the actual knowledge of the petitioner, rather than the constructive knowledge of his attorney, counsel could ensure that the test would present no bar to a claim simply by not explaining the claim to his client. The state could not meet the deliberate bypass standard if the petitioner was ignorant of his claim at the time of the default.

In Buelow v. Dickey, 847 F.2d 420 (7th Cir. 1988), cert.denied 489 U.S. 1039, the Wisconsin Supreme Court dismissed the Buelows'

petition for discretionary review of the Wisconsin Court of Appeals' Opinion affirming their convictions. The Wisconsin Supreme Court found that the petition was untimely filed. Wisconsin argued that procedural default barred federal habeas review of the Buelows' claims except under Sykes "cause and prejudice" standard. The Seventh Circuit agreed that Sykes should be applied rather than the "deliberate bypass" standard of Fay v. Noia. Likewise, in Morrison v. Duckworth, 898 F.2d 1298 at 1300-1301 (7th Cir. 1990), the Seventh Circuit concluded that because there is no constitutional right to counsel for a post-conviction proceeding, the petitioner could not assert ineffective assistance of counsel as cause for a procedural default in failing to assert habeas claims in state post-conviction proceedings.

In Toles v. Jones, 888 F.2d 95 at 99-100 (11th Cir. 1989), en banc rehearing granted, 905 F.2d 346 (1990), the Eleventh Circuit employed analysis similar to that of the

Fourth Circuit in this case, citing Carrier, Torna, and Finley:

> As cause for the procedural default of the ineffective assistance of trial counsel claim, Toles cites the inadequate assistance rendered by court-appointed coram nobis counsel. Toles alleges that counsel should have amended the pro se petition once it became clear that an ineffective assistance claim existed. Constitutionally ineffective assistance of counsel is cause for a procedural default. This argument presupposes that Toles has a constitutional right to counsel in a coram nobis proceeding. Since Toles had no constitutional right to coram nobis counsel, he cannot excuse a procedural default based upon ineffective assistance rendered by that counsel. [Citations omitted.]

Amici respectfully submit that this Court's opinions in Wainwright v. Sykes, Engle v. Issac, and Murray v. Carrier, supra, effectively indicate that the court has implicitly adopted the reasoning of the opinion of Justice Harlan (joined by Justices Clark and Stewart) dissenting in Fay v. Noia, 372 U.S. 391 at 448-476 (1963), and that the "deliberate bypass standard" (372 U.S. at 438-439) should be overruled. See especially

Engle v. Issac, 456 U.S. at 128, citing Justice Harlan's dissent in Sanders v. United States, 373 U.S. 1 at 24-25 (1963). The essence of Justice Harlan's opinion is that if a claim of error could not be considered by this Court on petition for certiorari, the claim should not be reviewed by the federal district court under the habeas corpus statute. (372 U.S. at 468-469). As Justice Harlan noted (372 U.S. at 473-474), quoting Yakus v. United States, 321 U.S. 414 at 444 (1944):

> No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.

Justice Harlan further noted in part (372 U.S. at 476), quoting Larson v. United States, 275 F.2d 673 at 679-680 (5th Cir. 1960):

> Manifest justice to an accused person requires only that he have an opportunity to correct errors that may have led to an unfair trial. The orderly administration of justice

requires that even a criminal case some day come to an end. [Emphasis added]

Dissenting in Sanders v. United States, 373 U.S. at 24-25, Justice Harlan stated in part:

> Both the individual criminal defendant and society have an interest in insuring that there will at some point be the certainty that comes with an end to litigation, and that attention will ultimately be focused not on whether a conviction was free from error but rather on whether the prisoner can be restored to a useful place in the community . . . . And while the scope of collateral review has expanded to cover questions of the kind raised by petitioner here, the Court has consistently held that neither habeas corpus [now Title 28 U.S.C. §2254] nor its present federal counterpart §2255 is a substitute for an appeal.

The amici states respectfully submit that this Court's opinion in Carrier is fully applicable to this case, and that Carrier permits the error of Coleman's counsel on post-conviction appeal be attributed to Coleman as a procedural default. It is further submitted that the error of counsel here, as in Carrier, cannot constitute cause for the default.

As the Court recognized in Murray v. Carrier, 477 U.S. at 489, a claim of ineffective assistance of counsel asserted as cause for a procedural default is simply an indirect means of presenting a claim of ineffective assistance of counsel. A rule that a federal habeas corpus petitioner may assert ineffective assistance of counsel regarding a state post-conviction proceeding or appeal therefrom as cause for a procedural default in the federal habeas corpus proceeding would simply become an indirect means of requiring that the states guarantee effective assistance of counsel regarding post-conviction proceedings and appeals. The states would be indirectly required to permit a convict to file a second post-conviction petition to require a second post-conviction hearing in order to ascertain the effectiveness of post-conviction counsel, or litigate the effectiveness of post-conviction counsel in the federal habeas court. Furthermore, the requirement of effective

assistance of post-conviction counsel would extend infinitely to an unlimited number of post-conviction proceedings since the convict could allege that his immediately previous post-conviction proceeding counsel was ineffective in failing to assert or adequately prove or adequately argue on appeal a claim regarding a constitutional error that the convict alleges occurred during his trial or on direct appeal from his conviction.

Neither the United States Constitution nor Congress in enacting 28 U.S.C. §2254 intended to require that every state criminal conviction became an endless series of post-conviction proceedings. See Delo v. Stokes, 110 S.Ct. 1880 (1990). As the Court has recognized in Sykes, Issac, Carrier, Smith and Barefoot, at some point the process must come to a conclusion. The standard for "cause" regarding a state post-conviction proceeding must be limited to "external impediment" and "actual innocence" as defined

in Murray v. Carrier, 477 U.S. at 492 and 495-496. Ctherwise, no criminal conviction will ever come to a conclusion.

CONCLUSION

WHEREFORE, the opinion below should be affirmed.

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